Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE STATE OF OKLAHOMA,

Petitioner,

vs.

RAYMOND JOE WOOD,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

W. A. Drew Edmondson
Attorney General of Oklahoma

Lisa Goodspeed, OBA *14640
Diana McKnight, OBA 16900
Assistant Attorneys General
4545 North Lincoln Boulevard, Suite 260
Oklahoma City, OK 73105
(405) 522-2969
(405) 522-4875 Fax

Attorneys for Petitioner

*Counsel of Record

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

A. Whether a defendant's waiver of his Sixth Amendment right to counsel, created when a defendant represented by counsel initiates further communication with police, carries any implied limitations within the meaning of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

B. Whether based on the totality of the circumstances standard, a defendant knowingly and intelligently waived his Sixth Amendment right to counsel being present during a polygraph examination whenever he initiated the polygraph exam in order to gain a favorable plea agreement with a positive examination result, appeared accompanied by counsel to take the exam, signed a written waiver before the pre-test exam and never requested that any part of the examination process cease or that his attorney be allowed into the examination room.

C. Whether a conflict in current federal law exists when a defendant requests a polygraph examination, signs a valid waiver prior to the polygraph examination and the state court enlarges the holding of *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982) by limiting the defendant's waiver of his Sixth Amendment right to counsel during the post-polygraph examination.

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OPINIONS BELOW

The Judgment and Sentence of the defendant was entered February 19, 1997, and is reprinted at pages 11-17 of the accompanying Appendix to this Petition ("Pet. App."). The opinion of the State of Oklahoma Court of Criminal Appeals is reported at 2000 OK CR 16, ___ P.3d ___ and is reprinted at Pet. App. 1-10. The Order of the State of Oklahoma Court of Criminal Appeals denying the State's Petition for Rehearing is reprinted at Pet. App. 31-33. The Order of the State of Oklahoma Court of Criminal Appeals denying the State's Motion to Stay Mandate is reprinted at Pet. App. 29-30.

BASIS FOR JURISDICTION

The decision of the Oklahoma Court of Criminal Appeals was rendered September 5, 2000 (Pet. App. at 1-10) and a timely Petition for Rehearing was denied on October 10, 2000. (Pet. App. at 31-33). On November 1, 2000, the Court of Criminal Appeals denied the State's Motion to Stay the Mandate. (Pet. App. at 29-30).

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Pet. App. at 34).

STATEMENT OF THE CASE

This case presents the opportunity for this Court to exercise its unique authority and require a state court follow this Court's previous rulings regarding the constitutional rights of an accused under the Sixth Amendment to the United States Constitution. In *Wyrick v. Fields*, 459 U.S. 42, 44, 103 S.Ct. 394, 395, 74 L.Ed.2d 214 (1982), this Court held that once a defendant, who had an attorney, made a voluntary, knowing and intelligent waiver of his right to have counsel present at a polygraph examination, and it was clear that defendant understood that right and was aware of his power to stop questioning at any time or speak to his attorney at any time, there was no requirement that police again advise him of his rights before questioning him at the same interrogation about the polygraph results.

To determine a voluntary, knowing and intelligent waiver, *Wyrick* citing *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), requires the court to examine the "totality of the circumstances." The Oklahoma Court of Criminal Appeals ignored the totality of the circumstances standard, creating instead a new constitutional standard that an informed waiver requires law enforcement to disclose its complete parameters of the

polygraph examination. In referring to parameters of the polygraph examination, the court is referencing whether or not the polygraph exam will include post-polygraph exam questions about the exam's results.

In *Wyrick*, this Court enlightened the Eighth Circuit Court of Appeals that they cannot create a per se rule that post exam questioning requires a new waiver. Clearly the Oklahoma Court of Criminal Appeals' holding in this case established the same type of illogical rule regarding a Sixth Amendment waiver which was condemned in Wyrick as an unjustifiable restriction on police questioning.

PROCEEDINGS IN THE STATE COURTS

On June 23, 1995, the Respondent, Raymond Joe Wood exposed his private parts to "A.M" a five year old girl in Ponca City, Oklahoma.

Respondent, through his attorney requested a polygraph examination. (Pet. App. at 49). Prior to the polygraph examination, Respondent executed a written waiver of his right to have counsel present with him during the exam. (Pet. App. at 40-41). At the conclusion of the polygraph examination, the polygraph examiner asked Respondent to explain why his answers were deceptive. While the examiner put the polygraph equipment away, Respondent prepared a handwritten letter confessing to exposing his private parts to "A.M." and signed the letter. (Pet. App. at 42-45).

On September 3, 1996, Respondent, through his attorney, filed a Motion to Suppress Statements in the District Court of Kay County. Respondent alleged in his motion that his statements given during the post-polygraph examination were involuntarily given, were the product of coercion and were not contemplated by Defendant's and counsel's waiver of his right to counsel and right to remain silent. (Pet. App. at 18-19).

On October 10, 1996, the Honorable District Court Judge D.W. Boyd conducted a hearing on Respondent's Motion to Suppress Statements. At the suppression hearing, Oklahoma State Bureau of Investigation (O.S.B.I.) Agent Steve Tanio testified that Respondent and his attorney presented themselves for a polygraph examination at the designated time and location. (Pet. App. at 38). Agent Tanio testified that he did not recall any discussions with Respondent's attorney prior to advising Respondent of his Miranda rights before the pre-polygraph examination. (Pet. App. at 40-41).

At that same hearing, Respondent's attorney testified that his client did in fact request the polygraph examination. (Pet. App. at 49). Further, his attorney stated that he was aware that the polygraph examiner does a pre-test asking for his client's version of events and admitted discussing with his client how the Respondent was going to discuss the facts of the case with the examiner. (Pet. App. at 55). Finally his attorney testified that he did not think that Miranda was necessary because the polygraph results were not admissible in court and did not request to be present during the polygraph examination. (Pet. App. at 55-56). At the conclusion of the suppression

hearing, Judge Boyd asked Petitioner and Respondent to submit cases in support of their respective positions.

Then on October 11, 1996, Judge Boyd found that under the totality of the circumstances the Respondent knowingly and willingly waived his right to have counsel present and to remain silent and overruled Respondent's Motion to Suppress Statements. (Pet. App. at 20).

Respondent was subsequently tried in the District Court of Kay County, in Case No. CF-95-350. During the State of Oklahoma's case in chief, over Respondent's objection, Judge Boyd admitted Respondent's letter he wrote during the post-polygraph examination which had been the subject of the Respondent's pre-trial Motion to Suppress.

On January 15, 1997, Respondent was convicted of Indecent Exposure After Former Conviction of Two or More Felonies in violation of Okla. 21, § 1021 (A) (Supp. 1991). Respondent was sentenced to two hundred (200) years in the penitentiary and ordered to pay a ten thousand dollar ($10,000) fine, consistent with the recommendation of the jury by Judge Boyd on February 19, 1997. (Pet. App. at 11-17).

Respondent appealed his conviction and sentence to the Oklahoma Court of Criminal Appeals. Respondent raised numerous claims on appeal. One claim raised by Respondent was that the trial court erred by admitting a confession which was secured through a violation of Respondent's Sixth Amendment right to assistance of counsel. On September 5, 2000 the Oklahoma Court of Criminal Appeals found this proposition of error to have merit and reversed and remanded the case for a new trial.

The Oklahoma Court of Criminal Appeals did not address the other claims raised by Respondent. *Wood v. State*, 2000 OK CR 16, ___ P.3d ___. (Pet. App. at 1-10).

On the 20th day of September, 2000, the State of Oklahoma filed a Petition for Rehearing and Motion to Stay the Mandate with the Oklahoma Court of Criminal Appeals. (Pet. App. at 21-28). The Oklahoma Court of Criminal Appeals denied the State's Petition for Rehearing on October 10, 2000. (Pet. App. at 31-33). Then on November 1, 2000, the Court of Criminal Appeals denied the State's Motion to Stay the Mandate. (Pet. App. at 29-30).

REASONS FOR GRANTING THE WRIT

A. The Respondent who was represented by counsel waived his Sixth Amendment right to counsel when he initiated contact with police, which is the holding of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

B. Based on the totality of the circumstances standard which this Court established in *Edwards v. Arizona*, 451 U.S. 466, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), Respondent knowingly and intelligently waived his Sixth Amendment right to counsel being present during the pre-polygraph test, polygraph examination and post-polygraph questioning.

C. The decision of the Oklahoma Court of Criminal Appeals is in direct conflict with this Court's holding in *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214

(1982), by limiting the defendant's waiver of his Sixth Amendment right to counsel during the post-polygraph examination to only those subjects disclosed by law enforcement to the defendant before defendant executes a waiver.

ARGUMENT

A.

Consistent with the holding of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the Respondent waived his Sixth Amendment right to counsel when Respondent, who was represented by counsel, initiated contact with police.

The general law is that a defendant who is represented by counsel may be questioned by law enforcement if that defendant reinitiates dialogue with law enforcement. *Edwards v. Arizona*, 451 U.S. 466, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). In *Edwards*, this Court held that once the defendant has invoked his right to an attorney, his Sixth Amendment right attaches and the defendant is not subject to further interrogation by authorities unless the accused himself initiates further communication, exchanges, or conversations with police.

Further, in *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), the Court held that the defendant's Sixth Amendment right attaches once adversarial criminal prosecutions have begun. However, the Court held that the *Edwards* rule is offense-specific. That once the defendant's right to counsel attaches to that offense, he cannot be reapproached regarding that

offense, but in the alternative, he can be approached regarding other offenses in which his right has not attached.

The Oklahoma Court of Criminal Appeals in its majority opinion acknowledges that Respondent and his attorney requested and agreed to a polygraph examination by Agent Steve Tanio. (Pet. App. at 2). However, the Oklahoma Court of Criminal Appeals held nothing in the record indicated that Respondent agreed to post-polygraph interrogation without counsel which violated Respondent's Sixth Amendment right to counsel.

By ruling this way, the Oklahoma Court of Criminal Appeals has placed limitations on the Sixth Amendment to the United States Constitution and this Court's decision in *Edwards*.

B.

Based on the totality of the circumstances standard which this Court established in *Edwards v. Arizona*, 451 U.S. 466, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), defendant knowingly and intelligently waived his Sixth Amendment right to counsel being present during the polygraph examination and post-polygraph questioning.

Based on the totality of the circumstances standard set out by this Court in *Edwards v. Arizona*, 451 U.S. 466, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), it is clear Respondent knowingly and intelligently waived his Sixth Amendment right to counsel being present during the polygraph examination.

Respondent initiated the contact with law enforcement and consented to Agent Tanio conducting the exam. (Pet. App. at 49). There is nothing to suggest an agreement as to when the exam would conclude. (Pet. App. at 46-60). Respondent signed the waiver and due to his numerous past experiences with law enforcement knew he could at any time invoke his right to have his attorney present. (Pet. App. at 40). Neither Respondent nor his attorney requested counsel to be present during the examination. (Pet. App. at 55). Respondent was never promised anything nor coerced to give a statement, either expressed or implied.

The turning off of the polygraph machine and Respondent's attorney not anticipating post-test questioning is not sufficient to overcome the knowledge of the right to counsel as explained prior to the test. It would have been unreasonable for Respondent and his attorney to assume that Respondent would not be informed of the polygraph readings and asked to explain any deception. *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982).

The Court in *Wood* applied *Young v. State*, 1983 OK CR 126, 670 P.2d 591, which found that the techniques used by the polygraph examiner were coercive in nature, a Fifth Amendment issue. Respondent's claim for relief was that his Sixth Amendment right to counsel had been violated. The Oklahoma Court of Criminal Appeals decision failed to apply the totality of the circumstances standard set out by this Court in *Edwards*.

C.

The decision of the Oklahoma Court of Criminal Appeals is in direct conflict with this Court's holding in *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982), by limiting the defendant's waiver of his Sixth Amendment right to counsel during the post-polygraph examination.

The Oklahoma Court of Criminal Appeals has placed constitutional limitations on a defendant's waiver of Sixth Amendment right to counsel during post-polygraph questioning, which is in direct conflict to this Court's decision in *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). In *Wyrick*, the defendant Fields, a soldier, was arrested for raping an 81 year old woman and subsequently released on his own recognizance. The defendant then consulted with his attorney who had been provided to him by the Army, after that consultation, he requested a polygraph examination. An agent of the Army's Criminal Investigation Division did the polygraph. The Defendant was given a written consent document, which he signed, informing him of his rights. At the conclusion of the polygraph, the agent told the defendant that there had been some deceit, and asked him if he could explain why his answers were bothering him. The defendant then admitted to having sex with the 81-year-old woman, but that the victim had instigated and consented to the acts. The agent then asked the defendant if he wanted to discuss the matter further with another agent and with the Chief of Police, which he agreed to. Defendant was again given his Miranda rights prior to being questioned by different agents. The defendant's

answers to the Chief of Police were the same as to the agent.

In the *Wyrick* case, the Court accepted certiorari and reversed the Court of Appeals' opinion in which that court held that the State had failed to satisfy its burden of proving that "Fields knowingly and intelligently waived his right to have counsel present at the post-test interrogation." The Court suggested that had the CID agent merely "paused to remind the defendant" of his rights, thus providing "meaningfully timed Miranda warnings," there would have been no violation. Id. at 396. The U.S. Supreme Court stated that "in reaching this result, the Court of Appeals did not examine the "totality of the circumstances," as *Edwards* requires. Fields did not merely initiate a "meeting." By requesting a polygraph examination, he initiated interrogation. That is, Fields waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected. Fields validly waived his right to have counsel present at "post-test" questioning, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a "knowing and intelligent relinquishment or abandonment" of his rights. Id. at 396. The Court found that the mere disconnecting of the polygraph equipment did not effectuate a significant change in the character of the interrogation; the Court said that this activity was not coercive. The Court held that merely disconnecting the polygraph equipment did not remove the knowledge from Fields' mind that he could stop the questioning at any time, and that he could request at any time that his

lawyer join him. Id. at 396. The Court held that the rule set out by the Court of Appeals is "simply an unjustifiable restriction on reasonable police questioning and that the Court of Appeals misapplied *Edwards* and created an unjustified per se rule." Id. at 397.

In the case at bar, we have the same circumstances as in the *Wyrick* case. Respondent was represented by an attorney and he initiated police contact by asking for a polygraph. He was advised of his Miranda rights and knowingly and voluntarily waived those as evidenced by affixing his signature to the waiver form. The Oklahoma Court of Criminal Appeals' opinion in *Wood* does not dispute that the examination and questioning was done knowingly and voluntarily.

The Oklahoma Court of Criminal Appeals, in reversing for a new trial, ignored the clear language of *Wyrick*, fashioning its own rule. The Eighth Circuit was criticized in *Wyrick* for fashioning a rule that the police must advise the suspect of his rights again after the examination but before questioning him at the same interrogation about the results of the polygraph. The *Wyrick* Court criticized the rule on the basis that the question put to Fields after the examination would not have caused him to forget the right of which he had been advised and which he had understood moments before. *Wyrick*, Id. at 396.

The rule fashioned by the Oklahoma Court of Criminal Appeals is that for an informed waiver law enforcement must disclose the complete parameters of the polygraph examination prior to testing and adhere strictly to those parameters. The Oklahoma Court of

Criminal Appeals' rule is like the rule condemned in *Wyrick* as an "unjustifiable restriction on reasonable police questioning" as it fails to recognize that there is one instigation and one interrogation.

As this Court stated in *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975):

> "by creating an inflexible rule that no implicit waiver can ever suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution."

Clearly, the Oklahoma Court of Criminal Appeals has impermissibly attempted through its *Woods* ruling to add to the mandates of the United States Constitution.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

W. A. Drew Edmondson
Attorney General of Oklahoma

Lisa Goodspeed, OBA *14640
Diana McKnight, OBA 16900
Assistant Attorneys General
4545 North Lincoln Boulevard,
Suite 260
Oklahoma City, OK 73105
(405) 522-2969
(405) 522-4875 Fax

Attorneys for Petitioner

**Counsel of Record*

Oklahoma Court of Criminal Appeals

2000 OK CR 16
___P.3d___
RAYMOND JOE WOOD, Appellant
-vs-
STATE OF OKLAHOMA, Appellee
Case No. F-99-870
September 5, 2000

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL MANDATE ISSUES, IT IS SUBJECT TO REVISION OR WITHDRAWAL

SUMMARY OPINION

CHAPEL, JUDGE:

¶ 1 Raymond Joe Wood was tried by jury and convicted of Indecent Exposure in violation of 21 O.S.1991, § 1021(A)(1), after former conviction of two felonies, in the District Court of Kay County, Case No. CF-95-350. In accordance with the jury's recommendation, the Honorable D.W. Boyd sentenced Wood to two hundred (200) years imprisonment and a fine of ten thousand ($10,000.00) dollars. Wood has perfected his appeal of this conviction.

¶ 2 Wood raises the following propositions of error:

> I. Mr. Wood was deprived of a fair trial on the issue of punishment when the trial court directed a verdict on the issue of Mr. Wood's alleged prior convictions and instructed on two prior convictions when the second alleged prior

conviction had been previously stricken and when the prosecutor appealed to societal alarm, garnered sympathy for the victim and raised the issue of parole.

II. The trial court erred in allowing the preliminary hearing testimony of Amanda to be admitted into evidence.

III. The trial court erred by admitting a confession which was secured through a violation of Mr. Wood's right to assistance of counsel.

IV. Appellant was denied a fair trial when the trial court improperly admitted hearsay testimony under 12 O.S.Supp.1992, § 2803.1.

V. The trial court erred in failing to address Mr. Wood's motion to dismiss his attorney.

¶ 3 After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits, we find that reversal is required under Proposition III and that the case must be remanded for a new trial. We do not address the other propositions of error raised on appeal.

¶ 4 Wood and his counsel agreed to a polygraph examination to be conducted by the O.S.B.I. Wood's counsel accompanied him to the polygraph session but was excluded from the examination room because O.S.B.I. policy prohibited counsel's presence. Counsel waited outside. After the polygraph examination was concluded, and while counsel was still outside, an O.S.B.I. agent *Mirandized* Wood and then questioned him, successfully obtaining an incriminating statement which was admitted against him at trial. This procedure violated Wood's Six

Amendment right to counsel and admitting this illegally obtained statement requires reversal.

¶ 5 In *Wyrick v. Fields*,[1] the defendant agreed to a polygraph examination and attended the exam without counsel. Here counsel was present and was excluded from the session. Wood and his attorney had agreed to a polygraph exam and it follows that anything Wood said during the exam could be used against him. However, nothing in this record indicates that Wood agreed to post-polygraph interrogation without counsel.[2]

¶ 6 Additionally, *Brewer v. Williams*[3] holds that an individual against whom adversary proceedings have begun has the right to legal representation during governmental interrogations.[4] The State has the burden of proving that the accused knowingly and intentionally relinquished or abandoned that right in order to introduce into evidence incriminating statements made outside the presence of counsel.[5] In *Brewer*, the United States Supreme Court found that the accused did not relinquish his rights to counsel and therefore the incriminating statements were not admissible since they were obtained in violation of the accused's constitutional rights.[6] The Court reasoned that one cannot unintentionally waive one's Sixth Amendment rights to counsel during government interrogation by merely agreeing to limited and specific contact with police outside the presence of counsel. In *Brewer*, the accused agreed only to transportation outside the presence of counsel, not to questioning conducted during the ride.[7]

¶ 7 Wood agreed to a polygraph exam outside the presence of counsel but not to post-exam interrogation without counsel. Wood's consent was limited and his counsel should have been present for any questioning following the conclusion of the polygraph exam absent a waiver. The accused and his attorney should execute a waiver of the right to counsel prior to a polygraph exam.[8] For an informed waiver, law enforcement must disclose the complete parameters of the polygraph examination and any statements obtained outside the scope of the waiver are inadmissible. Here, the police exceeded their agreement with Wood and his attorney and Wood's confession is inadmissible.

Decision

¶ 8 The Judgment and Sentence of the lower court is REVERSED and REMANDED for a new trial.

ATTORNEYS AT TRIAL

O. RONALD McGEE
P.O. BOX 750
PONCA CITY, OK 74602
ATTORNEY FOR DEFENDANT

LISA GOODSPEED TATE
ASSISTANT DISTRICT ATTORNEY
KAY COUNTY COURTHOUSE
P.O. BOX 411
NEWKIRK, OK 74647
ATTORNEY FOR STATE

ATTORNEYS ON APPEAL

THOMAS PURCELL
INDIGENT DEFENSE SYSTEM
GENERAL APPEALS DIVISION
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL
PATRICK T. CRAWLEY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITAL
OKLAHOMA CITY, OK 73104
ATTORNEYS FOR APPELLEE

OPINION BY: CHAPEL, J.
STRUBHAR, P.J.: CONCUR
LUMPKIN, V.P.J.: DISSENT
JOHNSON, J.: CONCUR
LILE, J: DISSENT

FOOTNOTES

[1] *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982).

[2] As a general rule, a confession obtained in anticipation of, during, or following a polygraph examination is not inadmissible. *Young v. State*, 1983 OK CR 126, ¶ 13, 670 P.2d 591, 594.

[3] *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

[4] *Brewer*, 430 U.S. at 401, 97 S.Ct. at 1240.

[5] *Brewer*, 430 U.S. at 404, 97 S.Ct. at 1242.

[6] *Brewer*, 430 U.S. at 404, 97 S.Ct. at 1242.

[7] *Brewer*, 430 U.S. at 404, 97 S.Ct. at 1232, 1242.

[8] To provide a clear record, it would be a better practice to have a written waiver.

LUMPKIN, VICE PRESIDING JUDGE: DISSENTING

¶ 1 The court's opinion cites to *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982), and *Young v. State*, 1983 OK CR 126, ¶ 13, 670 P.2d 591, 594 in reversing Appellant's conviction. This is curious, for *Wyrick v. Fields* and *Young* do not further Appellant's cause on appeal. Had these cases been properly applied, Appellant's conviction for indecent exposure, after former convictions for lewd molestation and making lewd or indecent proposals to a child under sixteen, would surely stand.[1]

¶ 2 The opinion acknowledges Appellant waived his right to counsel during the polygraph exam, but then states, "nothing in this record indicates that Wood agreed to post-polygraph interrogation without counsel." This precise issue was raised and rejected by the United States Supreme Court in *Wyrick v. Fields*.

¶ 3 In *Wyrick v. Fields*, the Eighth Circuit Court of Appeals had previously reversed the defendant's conviction on the basis that the State had failed to prove the defendant knowingly and intelligently waived his right to have counsel present at the post-polygraph interrogation. The Supreme Court found the Court of Appeals had failed to examine the "totality of the circumstances." The Supreme Court reversed the case, stating:

> The Court of Appeals relied on two facts indicating the need for a new set of warnings: the polygraph examination had been discontinued,

> and Fields was asked if he could explain the test's unfavorable results. To require new warnings because of these two facts is unreasonable. Disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation. The CID agent could have informed Fields during the examination that his answers indicated deceit; asking Fields, after the equipment was disconnected, why the answers were bothering him was not any more coercive. The Court of Appeals stated that there was no indication that Fields or his lawyer anticipated that Fields would be asked questions after the examination. But it would have been unreasonable for Fields and his attorneys to assume that Fields would not be informed of the polygraph readings and asked to explain any unfavorable result. Moreover, Fields had been informed that he could stop the questioning at any time, and could request at any time that his lawyer join him. Merely disconnecting the polygraph equipment could not remove this knowledge from Fields' mind.

Wyrick v. Fields, 459 U.S. at 47-48, 103 S.Ct. at 396. The same logic applies here.

¶ 4 Here, the record reveals Appellant requested the polygraph examination. His attorney consented to this procedure, and Appellant signed a *Miranda* waiver prior to the interview. Appellant was advised of his right to have counsel present during the examination. He did not request counsel to be present, nor did his counsel ask to be present. Thus, Appellant's counsel was not "excluded" from the examination room, as the opinion suggests. The record reveals the polygraph examiner had allowed the

presence of counsel during other tests, upon request from counsel.

¶ 5 Appellant did not merely initiate a meeting. He initiated an interrogation. That is, he "waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected." *Id.*, 459 U.S. at 47, 103 S.Ct. at 396. Furthermore, in light of *Wyrick v. Fields* and *Young*, it was unreasonable for Appellant's attorney to simply assume the examiner would not apprise Appellant of the results and ask him to explain an unfavorable result.[2]

¶ 6 There is no allegation here, much less proof, that the examiner went beyond the parameters of his agreement for a polygraph examination. The Court should restrain itself by applying the law to the facts in this case rather than assuming an *in loco parentis* role for the benefit of the Appellant and his attorney. Applying the law to the facts, I must therefore dissent to the Court's decision to reverse Appellant's conviction and remand for a new trial.

FOOTNOTES

[1] *See also Fields v. Wyrick*, 464 U.S. 1020, 104 S.Ct. 556, 78 L.Ed. 2d 728 (1983), in which the Court denied certiorari of the same case, on remand, after the Eighth Circuit found the defendant had knowingly and voluntarily waived his Sixth Amendment rights in conjunction with his post-polygraph interrogation. *See also, Fields v. Wyrick*, 706 F.2d 879 (8th Cir. 1983). Furthermore, *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 2d 424 (1977), decided five years prior to *Wyrick v. Fields*, is clearly distinguishable.

[2] The examiner's post-examination interrogation was not coercive in nature, as the techniques used in *Young* were. *See* 10-10-96 Tr. at 18. In *Young*, the examiner apparently told the defendant that he could get detectives "working for him", that he could "get the people on his side", i.e., the jury, and that he could receive "sympathy" and forgiveness by confessing. He also appears to have told the defendant that, absent a confession, the detectives would work against him "trying to build up a case of cold-blooded murder." *Young*, 1983 OK CR 126, ¶ 16, 670 P.2d 594. In addition, it should be noted the facts in *Young* are unique. The defendant in *Young* was taken into custody as a material witness. The police failed to comply with the statutory requirements for taking a material witness before a district judge "without unnecessary delay," and this failure was a relevant factor in adjudicating the voluntary nature of the interrogation. Further, *Young* is a case relating to the Fifth Amendment right to counsel rather than Sixth Amendment rights. And, in the present case, Wood's attorney agreed to the interrogation.

LILE, JUDGE: DISSENTS

¶ 1 In this case, Appellant agreed to undergo a polygraph examination. His lawyer went with him and they consented to examination without the lawyer present. Appellant was advised of his *Miranda* rights, in his lawyer's presence, and waived his Fifth Amendment right to remain silent and his Sixth Amendment right to be represented by his attorney during the examination. The lawyer did not ask to stay and he was not purposefully excluded. At the close of the examination, the examiner asked Appellant if he could explain a deceptive result. Appellant's explanation amounted to a statement against interest. Appellant even wrote the District Attorney a

note containing the incriminating statements as the examiner packed up the polygraphic equipment. No one even suggests that the incriminating statements herein were coerced in any way or involuntary. The United States Supreme Court said in *Wyrick v. Fields*, 459 U.S. 42, 47, 103 S.Ct. 394, 396, 74 L.Ed.2d 214, 219: "But it would have been unreasonable for Fields and his attorney's to assume that Fields would not be informed of the polygraph readings and asked to explain any unfavorable result." In this case, the polygraph examiner did not specifically state to Appellant's lawyer that Appellant would be given the opportunity to explain a deceptive result. This Court puts the risk of the omission upon the State. In accordance with the ruling of the U.S. Supreme Court, I would put that risk upon Appellant. Exclusion of this evidence, under the facts of this case, is not constitutionally required and, further, is not proper or appropriate.

IN THE DISTRICT COURT IN AND FOR KAY COUNTY STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff, vs. Raymond Joe Wood, DOB: 12-27-57, SSN: 441-62-5001, Defendant(s).	]]]]]]]]]]	CASE NO. CF-95-350

JUDGMENT AND SENTENCE

(Filed Feb. 20, 1997)

NOW, on this 19th day of February, 1997, this matter comes on for hearing before the undersigned Judge, for sentencing and the Defendant, Raymond Joe Wood, appears personally and by Attorney, Ron McGee, the State of Oklahoma appears through Assistant District Attorney Lisa Goodspeed Tate, and the Defendant having previously:

( ) Entered a Plea of Guilty

( ) Entered a Plea of Nolo Contendere

(X) Been found Guilty by Jury

( ) Been found Guilty by Judge after waiver of Jury Trial

( ) Other: _____

to/of the crime(s) of:

COUNT	OFFENSE(S)	STATUTORY REFERENCE
I	Indecent Exposure	21 O.S.§ 1021 A 1(Felony/~~Misd~~)
_	_____	O.S.§ _____ (Felony/Misd)
_	_____	O.S.§ _____ (Felony/Misd)

(X) The defendant has previously been convicted of 2 felony crimes and the sentence has been enhanced in accordance with the provisions set forth in 21 O.S.§ 51; and, _____.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Defendant, Raymond Joe Ward, is guilty of the above described offenses and is sentenced as follows:

TERM OF IMPRISONMENT

COUNT	SENTENCE TO A TERM OF
I	200 years
—	_____
—	_____

under the custody and control of:

(X) Oklahoma Department of Corrections;

( ) The Kay County Sheriff; or

( ) Other: _____

These terms to be served as follows (CONSECUTIVE/ CONCURRENT):

_____

_____

_____

TERM OF IMPRISONMENT WITH EXECUTION OF SENTENCE SUSPENDED IN PART

COUNT SENTENCED TO A TERM OF

___ _____

___ _____

___ _____

With all except the first _____ suspended.

under the custody and control of:

( ) Oklahoma Department of Corrections;

( ) The Kay County Sheriff; or

( ) Other: _____

Pursuant to the Rules and Conditions of Probation entered by the Court.

These terms to be served as follows (CONSECUTIVE/ CONCURRENT):

_____

_____

_____

TERM OF IMPRISONMENT WITH EXECUTION OF SENTENCE SUSPENDED

COUNT SENTENCE TO A TERM OF

___ _____

___ _____

___ _____

under the custody and control of:

( ) Oklahoma Department of Corrections;

( ) The Kay County Sheriff; or

( ) Other: _____

all of said term(s) of imprisonment suspended pursuant to the rules and conditions of probation entered by the court.

These term(s) to be served as follows (CONSECUTIVE/ CONCURRENT):

_____

_____

_____

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED BY THE COURT that in addition to the preceding terms, the Defendant is also sentenced to:

FINE

(X) The defendant shall pay a fine of $10,000.00

( ) immediately; or

( ) on or before _____ at the rate of $ _____ per _____, or within _____ days of release from the Department of Corrections.

(X) payment of $10,000.00 is suspended.

COSTS, VCA, RESTITUTION

( ) The defendant shall pay costs, fees, and restitution in accordance with the schedule attached as Exhibit A.

RULES AND CONDITIONS OF PROBATION

The rules and conditions of probation as ordered by the court and signed by the defendant, acknowledging his/her understanding of the rules and conditions, are incorporated as Exhibit _____.

ATTORNEY FEES

( ) The defendant shall pay court-appointed attorney fee in the amount of $_____ on or before the ____ day of _____, 19__, to _____.

HEARING ON ABILITY TO PAY AFTER INCARCERATION

( ) The defendant shall report to the District Court of Kay County within _____ days of release for a hearing on the defendant's ability to pay fines and costs pursuant to Section VIII of the Rules of the Court of Criminal Appeals, 22 O.S., Ch. 18, App.

IT IS FURTHER ORDERED that judgment is hereby entered against the Defendant as to the fines, costs and assessments set forth above.

The Court further advised the Defendant of his/her rights and procedure to appeal to the Court of Criminal Appeals of the State of Oklahoma, and that if he/she desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State subject to reimbursement of the cost of representation in accordance with Sec. 1355.14 of Title 22.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Kay County,

Oklahoma, is ordered and directed to deliver the Defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of the Defendant as provided herein. A second copy of this Judgement and Sentence to be warrant and authority of the sheriff for the transportation and imprisonment of the Defendant as herein before provided. The Sheriff to make due return to the Clerk of this Court, with his proceedings endorsed thereon.

Witness my hand the day and year first above mentioned.

/s/ D.W. Boyd
JUDGE OF THE DISTRICT COURT
D.W. BOYD
LESLIE D. PAGE
D.C. REVARD
DONALD C. WELCH

ATTEST:
GLENDA EMERSON, KAY COUNTY COURT CLERK

By: /s/ Raven T. CallsHim
DEPUTY CLERK

CLERK'S CERTIFICATION OF COPIES

I, Glenda Emerson, Clerk of the District Court of Kay County, State of Oklahoma, do hereby certify the foregoing to be true, correct, full and complete copy of the original Judgment and Sentence in the case of the State of Oklahoma vs. ____ as the same appears of record in my office.

WITNESS my hand and official seal this ___ day of ___, 19___.

GLENDA EMERSON, KAY COUNTY COURT CLERK

By: _____
DEPUTY CLERK

SHERIFF'S RETURN

I received this Judgment and Sentence the _____ day of _____, 19___, and executed it by delivering the Defendant to the Warden of the Lexington Assessment and Reception Center at Lexington, Oklahoma, on the _____ day of _____, 19___. I also certify the above prisoner has served _____ days in the County Jail on the present charge or charges.

MARION VANHOESEN, SHERIFF OF KAY COUNTY

By: _____
DEPUTY SHERIFF

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Plaintiff,	)	
-VS-	)	Case No. CF-95-350
RAYMOND JOE WOOD,	)	
Defendant.	)	

MOTION TO SUPPRESS STATEMENTS

(Filed Sep. 03, 1996)

COMES NOW THE DEFENDANT and moves this Honorable Court to suppress any statements made by him to O.S.B.I. Investigator Tanio following his polygraph examination and the letter written by defendant at Tanio's direction on the grounds and for the reasons that said statements were involuntarily given, were the product of coercion and were not contemplated by Defendant's and counsel's waiver of his right to counsel and right to remain silent.

In support hereof, Defendant would cite the following authorities:

Young v. State, 670 P.2d 591 (Ok. Cr. 1983);
People v. Zimmer, 329 N.Y.S.2d 17 (NY 1972);
State v. Schlise, 271 N.W.2d 619 (Wisc. 1978);
People v. Higgins, 607 N.E.2d 337 (Ill. App. 1993).

WHEREFORE, premises considered, the Defendant prays that the Court suppress any statements made by him to O.S.B.I. Investigator Tanio following his polygraph examination and the letter written by defendant.

This motion is made in good faith to secure the substantial ends of justice, and not for the purpose of delay.

Respectfully Submitted:

/s/ Thomas E. Salisbury
THOMAS E. SALISBURY
Lawyer & Public Defender
OBA #7879
P.O. Box 37, 108 West Grant
Tonkawa, OK 74653

(405) 628-3181

CERTIFICATE OF SERVICE

On this 3rd day of Sept., 1996, a true and correct copy of the foregoing pleading was served on opposing counsel by:

__ Mailing same with sufficient postage prepaid to:

Office of District Attorney
Kay County Courthouse
Newkirk, OK 74647

X Personally serving same at:

Office of District Attorney
Kay County Courthouse
Newkirk, OK 74647

/s/ Thomas E. Salisbury
THOMAS E. SALISBURY

In The District Court of Kay County
State of Oklahoma

Case No. CF95-350

ORDER

(Filed Oct. 15, 1996)

State vs. Wood
10/11/96

This matter came on for hearing on the 10th day of October on motion to quash the information and motion to suppress statements filed herein by the Defendant. The State was present and represented by Lisa Goodspeed Tate and the Defendant was present in person and with counsel Ron McGee.

The Court having heard the evidence and arguments of counsel and having reviewed the briefs filed by the parties finds that

1) The motion to quash should be overruled.

2) Under the totality of the circumstances the Defendant knowingly and willingly waived his right to have counsel present and to remain silent.

It is therefore ordered that the Defendant's motion to suppress statements and motion to quash are overruled.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RAYMOND JOE WOOD, Appellant, v. **STATE OF STATE OF OKLAHOMA,** Appellee.	)	Case No. F-99-870

PETITON FOR REHEARING AND MOTION TO STAY MANDATE

(Filed Sept. 20, 2000)

Comes now the State of Oklahoma, Appellee, by and through Attorney General W.A. Drew Edmondson and asks this court to grant rehearing to reconsider this decision rendered September 5, 2000 in the above-captioned case and to stay the issuance of the mandate pending rehearing.

This Court reversed and remanded the case for a new trial on its finding that a Sixth Amendment violation had occurred in the questioning of the defendant by an O.S.B.A. polygraph examiner. The facts show that the defendant and his counsel requested a polygraph examination which was conducted by the O.S.B.I. Counsel did not ask to be included in the polygraph session. The examiner read the defendant his Miranda rights and the defendant signed a form waiving those rights. Following the examination, the defendant gave an incriminating confession which was used against him at trial. This

Court found that the defendant's Sixth Amendment rights were violated because, although he agreed to the polygraph without counsel, he did not agree to post-polygraph interrogation without counsel. *Wood v. State,* 2000 OK CR 16, ¶ 5.

The rules of this Court, Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App.(1999), provide that a petition for rehearing may be granted for the following reasons: (1) some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court; or (2) the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called. This court's decision overlooked a very important question which is decisive of this case and which was answered very clearly in *Wyrick v. Fields,* 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982).

First, a brief recitation of the particular facts of this case is necessary. In this case, the defendant and his attorney requested a polygraph examination (Mt. 34). The defendant's attorney accompanied him to the room where the polygraph examination was being held. The examiner discussed the examination with the defendant and read him his rights and the defendant signed the "OSBI Polygraph Examination Release and Rights Waiver Form" (Mt. 11-12, attached to Tr. II).[1] By signing that form, the defendant waived his right to remain silent, to talk to an

---

[1] The majority's statement that the O.S.B.I. agent *Mirandized* the defendant **after the polygraph examination was concluded** is not consistent with the testimony at the motion hearing.

attorney and to have an attorney present during questioning. The examiner, Steve Tanio, did not recall whether the attorney was present with the defendant during the discussion of his rights (Mt. 12)

After the test was administered, the examiner felt the defendant was being deceptive so the defendant was given an opportunity to explain (Mt. 13-14). Agent Tanio testified that it is normal practice, on deceptive individuals, to tell the defendants the results of the test and give them the opportunity to explain (Mt. 14). The defendant initially continued to deny the accusation, maintaining that it was an accident, then admitted that he had deliberately exposed himself (Mt. 14-15). Agent Tanio asked the defendant if he would write a letter to the District Attorney's Office outlining his admissions and the defendant wrote out a handwritten statement (Mtn. 16-17).

The critical question in determining the admissibility of the statement is whether the defendant's statement, later used against him at trial, was voluntary. The general law is that a defendant who is represented by counsel may be questioned by law enforcement if that defendant reinitiates dialogue with law enforcement. *Edwards v. Arizona*, 451 U.S. 477, 484-487, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This Court, however, did not focus on this relevant question but parsed the examination into two components and fashioned its own rule. Thus, the question decisive of the case – whether the facts of this case show that the defendant initiated questioning – was overlooked.

In its brief on appeal, the State relied on the Supreme Court's decision in *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct.

394, 74 L.Ed.2d 214 (1982). In reversing for a new trial, this Court attempted to distinguish *Wyrick* by noting that in that case, the defendant agreed to a polygraph examination and attended the exam without counsel whereas here, counsel was present and was excluded from the session. A finding that counsel was "excluded" is not supported by the record. Counsel was not excluded, he simply never asked to be present during the examination, as is common practice (Mt. 24-25).

This Court also stated that Wood and his attorney had agreed to a polygraph exam and it followed that anything Wood said during the exam could be used against him. However, nothing in the record indicated that Wood agreed to post-polygraph interrogation without counsel. In making this finding, the court overlooked the important holding of *Wyrick* – that agreeing to a polygraph examination necessarily implies agreement to post-exam questioning.

This question of whether a defendant waives further questioning by agreeing to a polygraph examination was answered unequivocally in *Wyrick* when the *Wyrick* Court clearly held that by requesting a polygraph examination, defendant Fields initiated interrogation. The Court stated that Fields waived "not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected". *Wyrick*, 459 U.S. at 47. The *Wyrick* Court found that Fields validly waived his right to have counsel present at post-test questioning, unless the circumstances changed so seriously that his answers no

longer were voluntary, or unless he no longer was making a knowing and intelligent abandonment of his rights. *Id.*

This Court, in reversing for a new trial, ignored the clear language of *Wyrick,* fashioning its own rule. The Eight Circuit was criticized in *Wyrick* for fashioning a rule that the police must advise the suspect of his rights again after the examination but before questioning him at the same interrogation about the results of the polygraph. The *Wyrick* Court criticized the rule on the basis that the question put to Fields after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before. *Wyrick,* 459 U.S. at 48.

The rule fashioned by this Court: that for an informed waiver, law enforcement must disclose the complete parameters of the polygraph examination prior to testing and adhere strictly to those parameters, like the rule condemned in *Wyrick,* is an "unjustifiable restriction on reasonable police questioning" as it fails to recognize that there is one instigation and one interrogation.

The Eighth Circuit's opinion in *United States v. Eagle Elk,* 711 F.2d 80 (1983), *cert denied* 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984) shows the proper interpretation of *Wyrick.* The facts of that case are strikingly similar to those here. Eagle Elk was represented by counsel and was accompanied by his counsel to the facility where he was to undergo the polygraph examination. Prior to undergoing the examination, Eagle Elk was advised of his constitutional rights (the right to remain silent, to have a

lawyer present during questioning, and to stop answering questions at any time and speak to his lawyer). Eagle Elk signed the form stating that he understood those rights and was waiving those rights. In addition, Eagle Elk singed a polygraph interview consent form which advised him that he could refuse to take the test, could stop the test at anytime and could refuse to answer any individual questions. After the examination was completed, the examiner advised Eagle Elk that the test indicated he was not telling the truth and the examiner continued questioning Eagle Elk without again advising him of his rights. During this interrogation, Eagle Elk made incriminating statements.

A motion to suppress was filed and the Eighth Circuit, relying on *Wyrick v. Fields*, found that Eagle Elk, by requesting the polygraph examination, initiated the interrogation. The waiver of rights form informed Eagle Elk that he had the right to have an attorney present during questioning, and that even if he answered questions without a lawyer present he could still stop answering at any time and speak to a lawyer before answering further. Eagle Elk clearly waived those rights. Thus, the Eighth Circuit found that it Eagle Elk voluntarily, intelligently, knowingly and intentionally relinquished both his fifth and sixth amendment rights to have counsel present at the post-test interrogation.[2]

---

[2] Although Wood differs from *Eagle Elk* in that Wood was not told expressly that he could stop answering questions at any time, there is no constitutional requirement that a defendant be told such and this distinction is not critical here.

Applying this decision to the facts of this cases shows that Wood's original request for a polygraph examination was he equivalent to initiation of interrogation. He, like Eagle Elk, signed a rights waiver form acknowledging that he understood his constitutional rights and was willing to waive those rights and answer questions.

There are a number of other cases which have interpreted *Wyrick v. Fields* in the same manner. *Vassar v. Solem*, 763 F.2d 975 (8th Cir. 1985); *Powell v. Commonwealth of Kentucky*, 994 S.W.2d 1 (Ky. 1998); *Bivins v. Indiana*, 642 N.Ed.2d 928, 939 (Ind. 1995), *cert. denied Bivins v. Indiana*, 516 U.S. 1077, 116 S.Ct. 783, 133 L.Ed.2d 734. While these cases are not binding on this court, they show that courts have consistently interpreted *Wyrick v. Fields* in the manner advocated by the State and applied by the trial court here.

This court, in parsing the inquiry into polygraph and post-polygraph, overlooked a question decisive of this case: whether the defendant's initial request for a polygraph examination constituted the initiation of questioning. When that questions is answered in the affirmative, as it must be under *Wyrick*, there can be no doubt that the defendant's Sixth Amendment right to counsel was not violated. Rehearing should be granted to review this decision question and properly apply *Wyrick* to the facts of this case.

CONCLUSION

This court, in reversing and remanding for a new trial, failed to consider that the defendant's request for a

polygraph examination constituted the initiation of questioning. This inquiry is decisive of the case and when considered under the Supreme Court authority of *Wyrick v. Fields*, demands that rehearing be granted.

Respectfully submitted,

W.A. DREW EDMONDSON
OKLAHOMA ATTORNEY GENERAL

/s/ Sandra D. Howard
SANDRA D. HOWARD, OBA #11873
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL APPEALS

2300 N. Lincoln Blvd.
State Capitol Building,
Room 112
Oklahoma City, OK 73105-4894
(405) 521-3921
(405) 521-6246 (FAX)

ATTORNEYS FOR APPELLEE

CERTIFICATE OF MAILING

On this 20th day of September, 2000, a true and correct copy of the foregoing was mailed to:

Thomas Purcell
1623 Cross Center Drive
Norman, Oklahoma 73019

/s/ Sandra D. Howard
SANDRA D. HOWARD

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RAYMOND JOE WOOD, Appellant,	)	Case No. F-1999-870
v.	)	
STATE OF STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING MOTION TO RECALL OR STAY MANDATE

(Filed Nov. 1, 2000)

Raymond Joe Wood was tried by jury and convicted of Indecent Exposure in violation of 21 O.S. 1991 § 1021(A)(1), after former conviction of two felonies, in the District Court of Kay County, Case No. CF-95-350.

By its September 5, 2000, published opinion, this court reversed Wood's conviction and remanded for a new trial. On September 20, 2000, the State of Oklahoma filed a petition for rehearing which was denied by this Court on October 10, 2000. The mandate was issued on October 18, 2000.

On October 23, 2000, the State of Oklahoma filed a Motion to Recall or Stay the Mandate. After carefully reviewing the State's Motion to Recall or Stay the Mandate, we find that the State is not entitled to relief.

IT IS THEREFORE THE ORDER OF THE COURT that the Motion to Recall or Stay Mandate is **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 1st day of November, 2000.

/s/ Reta M. Strubhar
RETA M. STRUBHAR,
Presiding Judge

/s/ Gary L. Lumpkin [Dissent – A state should be entered to allow the State the right to seek further appellate review.]
GARY L. LUMPKIN,
Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON,
Judge

/s/ Charles S. Chapel
CHARLES S. CHAPEL,
Judge

/s/ Steve Lile [This is a reasonable request by the State and should be granted. I dissent]
STEVE LILE,
Judge

ATTEST:

/s/ James Patterson
Clerk

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RAYMOND JOE WOOD	)	
Appellant,	)	
v.	)	Case No.
THE STATE OF OKLAHOMA	)	F-99-870
Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

(Filed Oct. 10, 2000)

CHAPEL, JUDGE:

Raymond Joe Wood was tried by jury and convicted of Indecent Exposure in violation of 21 O.S.1991 § 1021(A)(1), after former conviction of two felonies, in the District Court of Kay County, Case No. CF-95-350. In accordance with the jury's recommendation, the Honorable D.W. Boyd sentenced Wood to two hundred (200) years imprisonment and a fine of ten thousand ($10,000.00) dollars. By published opinion handed down on September 5, 2000, this court reversed Wood's conviction.[1] The State is now before the Court on a Petition for Rehearing.

The State's Petition for Rehearing is governed by Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2000). According to rule 3.14(B), a petition for rehearing shall not be filed as a matter of course, but only if:

---

[1] *Wood v. State*, 2000 OK CR 16.

(1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) [t]he decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

The State raises one proposition in its petition for rehearing.[2] This proposition does not meet the criteria set forth in Rule 3.14(B). Accordingly, the State's proposition will not be addressed.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day of October, 2000.

/s/ Reta M. Strubhar
RETA M. STRUBHAR,
Presiding Judge

/s/ Gary L. Lumpkin
[Dissent based on separate writing to opinion]
GARY L. LUMPKIN,
Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON,
Judge

---

[2] The State suggests this Court overlooked controlling authority. On the contrary, as our Opinion clearly indicates, this Court thoroughly considered all relevant and persuasive authority in reaching its conclusion.

/s/ Charles S. Chapel
CHARLES S. CHAPEL,
JUDGE

/s/ Steve Lile
[I would grant rehearing because the Court's opinion relies upon a misstatement of the facts.]
STEVE LILE,
Judge

ATTEST:

/s/ James Patterson
Clerk

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 21, Section 1021 of the Oklahoma Statutes

Indecent Exposure – Indecent Exhibitions – Obscene or Indecent Writings, Pictures, Etc. – Solicitation of Minors

A. Every person who willfully either:

1. Lewdly exposes his person or genitals in any public place, or in any place where there are present other persons to be offended or annoyed thereby;

2. Procures, counsels, or assists any person to expose such person, or to make any other exhibition of such person to public view or to the view of any number of persons, for the purpose of sexual stimulation of the viewer;

3. Writes, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, or exhibits any obscene material or child pornography; or

4. Makes, prepares, cuts, sells, gives, loans, distributes, keeps for sale, or exhibits any disc record, metal, plastic, or wax, wire or tape recording, or any type of obscene material or child pornography, shall be guilty, upon conviction, of a felony and shall be punished by the imposition of a fine of not less than Five Hundred Dollars ($500.00) nor more than Twenty Thousand Dollars ($20,000.00) or by imprisonment for not less than (30) days nor more than ten (10) years, or by both such fine and imprisonment. Persons convicted under paragraphs 3 and 4 of subsection A of this section shall not be eligible for a deferred sentence.

B. Every person who:

1. Willfully solicits or aids a minor child to perform; or

2. Shows, exhibits, loans, or distributes to a minor child any obscene material or child pornography for the purpose of inducing said minor to participate in, any act specified in paragraphs 1, 2, 3 or 4 of subsection A of this section shall be guilty, upon conviction, of a felony and shall be punished by imprisonment in a state correctional institution for not less than ten (10) years nor more than thirty (30) years. Persons convicted under this subsection shall not be eligible for a deferred sentence.

Title 21, Section 51.1 of the Oklahoma Statutes

Second and Subsequent Offenses After Conviction of Offense Punishable by Imprisonment in State Penitentiary.

A. Except as otherwise provided in the Elderly and Incapacitated Victim's Protection Program, every person who, having been convicted of any offense punishable by imprisonment in the State Penitentiary, commits any crime after such conviction is punishable therefor as follows:

> 1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would by [sic] punishable by imprisonment in the State Penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the State Penitentiary for a term not less than ten (10) years.

2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the State Penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the State Penitentiary for a term not exceeding ten (10) years.

3. If such subsequent conviction if for petit larceny, the person convicted of such subsequent offense is punishable by imprisonment in the State Penitentiary for a term not exceeding five (5) years.

B. Every person who, having been convicted of felony offense, commits a third, or thereafter, felony offense within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty years. Felony offense relied upon shall not have arisen out of the same transaction or occurrence of series of events closely related in time and location. Nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death.

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Plaintiff,	)	Case No. CF-95-350
	)	F-99-870
vs	)	
RAYMOND JOE WOOD,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

(Filed May 7, 1997)

* * *

[10] A. Here in the upstairs jury room of this courthouse.

Q. All right. And were you under the understanding or did Mr. Wood tell you or myself or Mr. Salisbury that there were any conditions on the polygraph exam or were you just told to do a polygraph exam?

A. Just requested to do a polygraph exam of Mr. Wood.

Q. All right. And –

MR. MCGEE: Your Honor, I am sorry; I didn't hear the witness's response.

A. Just requested to conduct the polygraph exam of Mr. Wood.

Q. (By Ms. Tate) And prior to –

THE COURT: Pardon me.

Mr. Tanio, you might pull that microphone a little closer to you.

A. (complies)

THE COURT: Thank you.

You may proceed.

Q. (By Ms. Tate) Tell me how you began prior to the polygraph exam, what you did.

A. Basically, I set the instrument up and then I believe the Defendant, Mr. Wood, was brought by his attorney, or his attorney accompanied him to the room. And we sat down and there's a brief form that we have which I read off to the – which I read off to Mr. Wood saying how the [11] polygraph is voluntarily given of his own free will, he can't be forced, there can be no threats or promises for him to take that. Since it's a criminal matter, I also advise him of his Miranda rights. And then, requested what is – his capability to read and understand and I let him read the form; he took it and then he signed the waiver at the bottom waiving his Miranda rights and that he understood the polygraph was voluntary and of his own free will and that he would take it.

Q. May I approach the witness?

THE COURT: Yes.

Q. (By Ms. Tate) Let me pull that microphone just a little bit –

THE COURT: Yeah; finding a happy medium is a little difficult.

Q. (By Ms. Tate) I will show you what's previously been marked for identification purposes as Plaintiff's Exhibit No. 1; do you recognize that?

A. Yes, ma'am.

Q. And what do you recognize that as?

A. It's the OSBI Polygraph Examination Release and Rights Waiver Form.

Q. All right. And in that, what's – are all of the Miranda warnings and all of the Miranda rights specifically outlined in that?

[12] A. Yes, ma'am.

Q. And did Mr. Wood have any questions as to any of those rights?

A. No, ma'am.

Q. All right. And do you see his signature affixed to that?

A. Yes, ma'am.

Q. All right. Was his lawyer present when the Miranda rights and this form were signed and given to him?

A. I don't recall. I don't specifically recall if his attorney was present or not.

Q. But his attorney accompanied him to the room?

A. Yes, sir.

Q. Did Mr. Salisbury say anything to you prior to the polygraph exam beginning?

A. Not that I recall.

Q. And is this the first thing that you did with Mr. Wood was the Miranda warnings?

A. Other than introduced myself to him, yeah.

Q. All right.

MS. TATE: Your Honor, for motion hearing purposes today, we would ask for the admission of Plaintiff's Exhibit No. 1, which has been provided to the Defendant.

THE COURT: All right.

[13] MR. MCGEE: No objection.

THE COURT: Be admitted.

Q. (By Ms. Tate) After his Miranda warning, what did you do next, Mr. Tanio?

A. Then, basically, took some biographical and medical data from him, a standardized form that we use for our polygraphs, and then had him tell me his version of what had occurred.

Q. All right. Did – did you do that in just general terms; he just told you generally what had happened?

A. He gave me his statement of what his understanding was of what he was charged with and what had occurred.

Q. All right. And after that, what did you do then?

A. Then we formulated questions to ask him during the course of the polygraph exam and he gave me his answers to those questions.

Q. And did he know what the questions were going to be?

A. Yes.

Q. And did you then administer the polygraph test?

A. Yes, ma'am.

Q. All right. And is it policy, procedure – or what do you do after the polygraph exam has been taken and you have tested it and have the results?

A. After I have made my determination, we always give whoever we polygraphed an opportunity to explain any kind [14] of reactions they have to the exam. And in this case, I determined that Mr. Wood was being deceptive to me in regards to the issue which was he had, during the pre-test interview, had stated that he had accidentally exposed his penis to this little girl. And so, the issue was whether or not he intentionally or deliberately exposed his penis. And after I determined that based on the charge and all of the case information, all of the reports and witness statements I had, I believed he was being deceptive with that question and not truthful, and that's basically what I told him and went from there into an interrogation.

Q. All right. Is that part of the procedure and things that you have been taught to tell the defendants what the results of the test are?

A. Normal practice is – is, on a deceptive individual, is what I usually do is just tell them that based on all of the information I have, witness statements, police reports, taking everything into account, what you have

told me is not true, and just trying to determine the reasons for it.

Q. All right. And after making that statement to him, what did he say or do at that time?

A. Initially, he denied and maintained that it was an accident. And then, I have him a – scenario and asked him if he was – you know, I said without a shadow of a [15] doubt I am certain that he had intentionally and deliberately exposed himself to this little girl and I am just trying to find out why and what type of individual he is. Is he the type of individual that just prays on little children; is doing this just to pray on them, or is he the type of individual that has – truly cares for kids, has love and affection for them, and did he expose himself to this child in a mixed way of showing love and affection, and he took the lesser alternative of love and affection and then admitted that he had deliberately exposed himself to the little girl and that he had kissed her on the mouth. After he made those admissions, I asked him if he would write a letter to the District Attorney's office outlining those admissions on it.

Q. Did he say that he would do that then?

A. Yes, ma'am.

Q. All right. Was any of this interview taped?

A. No, ma'am.

Q. All right. And I –

MS. TATE: May I approach the witness, Judge?

THE COURT: Yes.

Q. (By Ms. Tate) I will hand you what's been previously marked for identification purposes as Plaintiff's Exhibit No. 2. Do you recognize that?

A. Yes, ma'am.

[16] Q. And what do you recognize that as?

A. This is the statement that Raymond Joe Wood wrote out addressed to the District Attorney's office regarding the incident involving Amanda.

Q. All right. Did he do that in your presence?

A. Yes, ma'am.

Q. All right. Did you – did he ever stop and say I don't want to do this and –

A. No.

Q. – or anything like that?

A. No, ma'am.

Q. All right. Did he ever ask for help in writing that instrument?

A. No, ma'am.

Q. And in that, did he state whether or not it was accidental or intentional?

A. He doesn't state that it was accidental. It states "I was trying to show her that someone did lover her when I kissed her on the mouth. And I am very" – "And I am sorry for showing her my dick too. Because I did not mean to scare her at all. When I did it, I was trying to show her that I love her and care for her."

Q. All right.

A. "I am sorry for what happened on that day." And signed his name.

[17] Q. And what were you doing while he was writing out this instrument?

A. Basically, collecting my paperwork up. Just being quiet while he is writing that up and collecting all of my paperwork and putting my instrument away.

Q. Did he sign that instrument?

A. Yes, ma'am.

Q. And what did you do then with that instrument?

A. I took it from him, initialed and dated it, made a copy in the District Attorney's office and then gave it to either yourself or one of your assistants.

Q. All right.

MS. TATE: We would ask for the admission of Plaintiff's Exhibit No. 2.

THE COURT: Any objection to Plaintiff's Exhibit No. 2?

Mr. MCGEE: Yes, Your Honor, I have objection to it. That's the purpose of my motion.

THE COURT: No. My question is whether the Court can consider for the purpose of this motion whether it can be admitted today.

MR. MCGEE: No objection.

THE COURT: Thank you.

We will admit it.

Q. (By Ms. Tate) Mr. Tanio, did you at any time promise

* * *

[31] THE CLERK: You do solemnly swear the testimony you are about to give in the cause now in hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. SALISBURY: I do.

THE COURT: And if you would have a seat to my left.

MR. SALISBURY: (complies)

THOMAS SALISBURY,

called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MCGEE:

Q. Your name is Thomas Salisbury?

A. That's correct.

Q. Mr. Salisbury, were you the prior court-appointed Defense attorney for the Defendant, Raymond Joe Wood?

A. That's correct.

Q. Were you Mr. Wood's Defense attorney on October 17th, 1995?

A. Yes, I was.

Q. Did you consent to a polygraph examination to be conducted by the OSBI on the Defendant, Mr. Wood?

A. Yes, I did.

Q. Did you consent to any custodial interrogation of [32] Mr. Wood following the polygraph examination?

MS. TATE: Judge, I would object to the leading nature of the question.

THE COURT: Would you rephrase your question such that it does not suggest an answer?

Sustained.

Q. (By Mr. McGee) Mr. Salisbury, were you aware of any interrogation that was going to take place on the Defendant?

A. No, I was not.

Q. If you had been aware of an interrogation, would you have consented to it?

A. No, I don't believe so; not at least without discussing it with my client first.

Q. Had you had – and I don't want to get into an attorney/client privilege situation here, but had you had conversations with the Defendant concerning his exercise of his right to have counsel present during questioning?

A. We – we discussed that at the very first meeting, like I always do with a client, that he is not to talk to

anybody unless I am there and, if they try to talk to him, to have them contact me first. That's one of the first things I do with every client I have ever represented.

Q. Have you represented previous clients and submitted to polygraph examinations on their behalf?

[33] A. Yes; numerous times over the last nineteen, twenty years.

Q. Has it been your experience that the polygraph examiners would conduct custodial interrogations of your clients following the polygraph examinations?

A. Up until becoming aware of one that occurred a year-and-a-half ago that was not with my client, but Mr. Hobbs', I had never had that happen to me before.

Q. What has been your experience with respect to the protocol of the polygraph examiner after the polygraph is concluded?

A. Almost every good examiner I have ever dealt with, be in Tulsa, Oklahoma City, the ones we have flown in from Chicago, didn't even tell my client what the results were. They – their response to their client was "I will let your lawyer know and he can discuss it with you." And that was the sum total at the end of the examination.

Q. And they would conduct the examination and no interrogation?

A. Yes, sir.

Q. And would that be – would your answer be the same with respect to whether they passed the polygraph or failed the polygraph?

A. Yes.

MR. MCGEE: That's all of the questions I have.

[34] MS. TATE: If I may?

THE COURT: Yes, you may inquire.

MS. TATE: Thank you, Judge.

CROSS EXAMINATION

BY MS. TATE:

Q. Mr. Salisbury, you and your client asked for a polygraph exam, is that correct?

A. Yes, that's correct.

Q. And I told you that I would be contacting Agent Steve Tanio, correct?

A. Yes.

Q. And you didn't have a problem with that, did you?

A. I had no problem with the examination.

Q. And you didn't say you wanted somebody else to do it, did you?

A. No.

Q. Didn't go out and look for anybody else to do it, did you?

A. No.

Q. You were aware that Mr. Wood would be asked to sign a Waiver of Rights in order for Mr. Tanio to do the exam, weren't you?

A. That, I can't answer. I don't recall. I know that one was done in this case because I was shown it later, but I do not recall and I can't – I am not saying yes and [35] I am not saying no, Ms. Tate. I don't recall discussing a Waiver of Rights.

Q. Well, would it not be advisable to have a Waiver of Rights anytime law enforcement is talking to your client, especially after you have been appointed?

A. Let me answer that question two ways. One, I have never had, in nineteen years of experience, a client required to sign a waiver in order to do a polygraph exam. If there was going to be interrogation, you bet; we would discuss whether or not there was going [sic] be a Waiver of Rights and decide whether or not there was going to be an interrogation.

Q. So, you – you think that this is the only case in which you have ever had a polygraph that a waiver has been signed?

A. Up until this – this case, I can recall of none of my cases, in nineteen years, that that has happened. The only other case I recall of was being told and doing some research for Mr. Hobbs shortly before this one that Mr. Piel did on a client down in Perry.

Q. Do you recall a client by the name of Willard Smith?

A. Yes.

Q. Okay. And do you recall that he, in fact, took a polygraph in the summer prior to this –

A. Was that –

[36] Q. – by Agent Tanio?

A. – prior to or after?

Q. Prior to.

A. If your dates say prior to, then I wouldn't disagree. But, yes, Steve did that one as well.

Q. All right. And I don't want to divulge anything in that case, but it was very similar in result and nature, was it not?

A. That's correct.

Q. But yet, you had no problem with Mr. Tanio doing the polygraph?

A. And I would have no problem today with Mr. Tanio doing a polygraph examination of any of my clients if I felt that was in their best interest.

Q. And you didn't ask him to not read the Waiver of Rights, correct?

A. No.

Q. And you didn't tell him to not interrogate him after the polygraph exam, did you?

A. No, because I didn't expect it.

Q. Well, but you didn't, did you?

A. No, but I didn't meet with Mr. Tanio.

Q. Okay. And – and I – maybe we need to check the records, but Mr. Smith, if my memory serves me correctly, did take a polygraph prior to Mr. Wood and with the same [37] results, you knew that, in fact, there would be a – an interview, an interrogation, whatever you want to call it, after the polygraph exam?

A. First, I can't tell you whether Mr. Smith came before or after Mr. Wood. To say that I contemplated that Mr. Wood would be interrogated by Mr. Tanio after the exam, no, I did not contemplate that at all.

Q. But since then, we have also used Mr. Tanio in other cases, haven't we?

A. Yes.

Q. And you haven't had a problem with the fact that you know that he talks with them after the exam?

A. No, because I have prepared every one of my clients from this one forward that they are not to discuss it afterwards.

Q. But some of them have?

A. Some of them have and, you know, I can't control each and every client.

Q. Well, after Mr. Smith took the polygraph and we had that same result, did you talk with your clients after that and tell them not to?

A. I am not – I am not recalling that one, to be real honest with you, that I was clear that he had given a statement or not. There's been a lot of clients and a lot of water under the bridge since that time and this time a [38] year, year-and-a-half ago.

Q. So, there could have been other clients prior to Mr. Wood that maybe you don't recall today?

A. There could be, but I sure don't recall them.

Q. You state that you tell your clients to exercise their right to have an attorney if, in fact, a Waiver of Rights and an interview begins, correct?

A. Correct.

Q. And was that something that you and Mr. Wood had discussed through your interviews with him?

A. After the first time I met with him – and, you know, it's standard operating procedure, one of the last things I do – I go over to the jail, I interview a client. When I am getting ready to leave, "Hey, have a nice day; if you need anything, give me a holler. Oh, by the way, don't talk to anybody, even a cellmate or a jailer. No telling who has got ears. Don't talk to law enforcement without calling me. If they read you your rights, you can call me anytime day or night and I will see you the next time I come back to the jail." That's usually the way I end the first interview.

Q. And so, you probably did that with Mr. Wood?

A. Probably did. I would bet I did.

Q. All right.

MS. TATE: May I have just one moment, Judge?

[39] (Ms. Tate confers with Agent Tanio after which the following proceedings were had:)

Q. (By Ms. Tate) I wish I had checked my notes. But let's assume that I am correct that Mr. Smith had had a

polygraph exam prior to Mr. Wood. Knowing that, would you have sat down, do you think, with Mr. Wood and told him to not talk to Agent Tanio?

A. If – I don't recall whether Mr. Smith came before or after Mr. Wood, number one.

Q. I am just saying if.

A. If – if he did, and if I knew that Mr. Smith went through an interrogation after the exam, which I – I don't recall now whether – when I or if I knew that, then I probably would – you know, in my mind, I would have sat down and spoke with Mr. Wood about it, –

Q. Would you –

A. – but I do not recall that.

Q. But would you have told him to not talk to Agent Tanio?

A. After the exam, yes.

Q. Okay.

A. That. . . .

Q. But not all of your clients do that?

A. You know, I am not – I am never there in the exam, just like you are not. I mean, it's a one-on-one [40] situation. The best I can do is advise my clients before they go in to take the exam and what they do once they get in there is – is out of my control at that point.

Q. If, in fact, you knew that there would be an interrogation, would you have asked to be present?

A. Yes.

Q. Did you ask to be present on this date?

A. No.

Q. Okay. And you know that Agent Tanio and any polygraph examiner does do a pre-test and asks them what their version of it is and these are the issues and these are the questions I am going to ask you?

A. You know, I expect that – that there is a pre – a pre-test exam – interview that follows the police reports. Usually, I have the reports by that point in time, I have gone over them with my client ahead of time. They know probably what Mr. Tanio or most good polygraph examiners – because I have dealt with a number of them, I usually know where they are headed with it. I talk to them about, you know, how they are going to discuss the facts of the case, that every good examiner will tell them what the questions are before they are strapped into the machine and that don't worry, you are going to know each and every question before you are hooked up to the machine, so, you know, don't let that worry you; you need [41] to remain calm and listen closely. And then the exam.

Q. All right. And since you do know that there will be a pre-test, there will be a discussion of the facts, the defendant will be talking, it's prudent that every polygraph examiner should give a Miranda warning, should they not?

A. No.

Q. You don't think they should?

A. Like I say, up until the last year-and-a-half or so, the nineteen years prior to this, I can think of Warren Powers in Tulsa, Deputy Clugston, Roy Clugston, Lynn Marcy out of the [sic] Chicago, Jack Jones out of Tulsa, I think Arthur Linville we have used out of Oklahoma City, every other polygraph examiner I can think of, knowing that the polygraph is not admissible in court, they are not going for admissible evidence. They are – you know, they do a pre-test interview without a Miranda. They do the exam without a Miranda. Cut it off there and let the people that have requested the test know it's either a pass or a fail.

Q. Well, if I had tried to introduce the – the pre-test statements of your client, you would file a Motion to Suppress for lack of Miranda, wouldn't you?

A. Yes.

Q. Did your information in the affidavit as to [42] psychological coercion, did that come from your client?

A. That come – yes.

Q. Okay. And in your affidavit, the Defendant needing to seek forgiveness from the victims in this case, did that also come from your client?

A. Yes.

MS. TATE: If I could have just a moment, Judge.

May I approach the witness, Judge?

THE COURT: Yes.

Q. (By Ms. Tate) Mr. Salisbury, I don't want to get into any other cases or client privilege, but I will hand

you what's previously been marked for identification for this hearing only as Plaintiff's Exhibit No. 3. Do you recall seeing that prior to today?

A. Lisa, I don't remember the written report. I remember a phone call with regard to the results of the exam.

Q. All right. And what date does it show that the exam was given and the report was prepared?

A. Shows a report date of September – okay.

Q. Should be on the second page.

A. Shows a report date up here of September 9th, which I assume was the date the test was given. And then a Receive stamp in the District Attorney's office of [43] September 13th.

Q. Of what year?

A. 1995. There's also a September 8th, '95 date at the end of the –

Q. All right. And that is clearly before October the 17th of 1995, correct?

A. That's true.

Q. All right. And Mr. Smith also wrote me a letter in that case, do you recall?

A. Yeah, I do.

Q. So you were aware that there had been an interrogation in that case, correct?

A. I am. . . .

Q. Well, if there was a written statement to me, you would know that there was a –

A. I would know that there was a written letter to you. Yes, I know that Willard told me about that afterwards. To – to tell you that I knew that that letter was the product of Mr. Tanio talking to him after the test or not, no, I don't know that. I –

Q. Okay. You don't believe that that came out of the polygraph?

A. No. I am not saying – what I am saying, Lisa, is I do not know. All I know is when – when I met with – without going into a lot of detail with – about Mr. [44] Smith, as to my best recollection of the letter was – my knowledge of the letter written by Mr. Smith was he told me about it afterwards that he wrote it –

Q. And I –

A. – after the exam.

Q. And I provided you a copy of that, didn't I?

A. Yes.

Q. Okay. Would it surprise you that Mr. Tanio dated it – initialed and dated it?

A. It wouldn't surprise me, no.

Q. All right.

MS. TATE: That's all I have, Judge.

THE COURT: Re – do you have any further Redirect?

MR. MCGEE: Just a couple questions.

REDIRECT EXAMINATION

BY MR. MCGEE:

Q. Mr. Salisbury, the – was the purpose of the test to facilitate a plea bargain agreement in the event that he passed it?

A. Yes.

Q. You certainly didn't expect that statements used during the test would ever be used against the Defendant, did you?

A. No, because the test is inadmissible.

[45] MR. MCGEE: That's all I have.

MS. TATE: If I may, Judge?

THE COURT: Yes.

RECROSS EXAMINATION

BY MS. TATE:

Q. The test results are inadmissible of the test itself, correct?

A. Correct.

Q. That's by case law?

A. (nodding)

MS. TATE: That's all I have.

THE COURT: All right.

This witness may be excused.

MR. SALISBURY: Thank you.

THE COURT: Mr. McGee, do you have further testimony to be offered?

MR. MCGEE: No, Your Honor.

THE COURT: All right.

Then I believe we have heard the evidence on this matter and I believe it is the State's burden to show that the statement was given voluntarily and it would be their opportunity to proceed at this time with argument.

MS. TATE: Thank you, Judge.

I would, obviously, ask the Court to overrule the Motion to Suppress and ask the Court to introduce the

* * *